APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1294

BARBARA ROSS, ET AL., APPELLEES

v.

COMMUNITY SERVICES, ET AL., APPELLEES

AND

CARLA A. HILLS, Individually and in her capacity as Secretary of the Department of Housing and Urban Development, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

(Argued May 6, 1976 Decided October 6, 1976)

Before BRYAN, Senior Circuit Judge, CRAVEN, Circuit Judge, and WYZANSKI, Senior District Judge.*

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* Sitting by designation.

PER CURIAM:

The Secretary of the Department of Housing and Urban Redevelopment appeals the determination of the District Court that she is *required* by section 236(f)(3)[1] of the National Housing Act,[2] as amended by the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633, to make operating subsidy payments to a low income housing project from a reserve fund established under section 236(g)[3] of that Act. The Secretary had refused to do so, and this suit was brought by the tenants of such a project, Uplands Apartments, Baltimore, Maryland, to enjoin continued refusal and to obtain the benefits of the subsidy.

It is the Secretary's position that she is vested with the discretion to refrain from making such payments and that here her declination was warranted. Further, she also pleaded a lack of authority to make them. The District Court concluded that she was entirely free to grant the subsidies and that she had offered no justifiable grounds for not paying them. To this end a preliminary injunction then issued directing the Secretary to apply to the use of the Uplands Apartments so much of the moneys held in the reserve fund, under section 236(g), as was available for the payment of operating subsidies. That injunction was made permanent on January 26, 1976 from which order this appeal is taken.

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[1] 12 USC § 1715z-1(f)(3).

[2] 12 USC § 1701 et seq.

[3] 12 USC § 1715z-1(g).

In the District Court, Judge Harvey expounded with clarity the intent of these statutes and fully laid out the obligations of the Secretary thereunder, as well as the entitlements of the tenants and the project owners. Ross v. Community Services, Inc., 405 FS 831 (December 1975) and 396 FS 278 (DC Md. May 1975). On our consideration of the record and the briefs, as well as the supplemental memoranda submitted by counsel, we perceive no inaccuracy in the District Judge's outline of the facts, or any infirmity of law, or a want of equity in his determinations. The decision of the District Court will not be disturbed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1294

[Filed Oct. 6, 1976, William K. Slate, II, Clerk]

BARBARA ROSS, ELLA SPARKS, KATHLEEN M. ARMES, BERNICE JOHNSON, BEVERLY STEWART, CYNTHIA JACKSON, DORIS JOHNSON, BARBARA CAMPBELL, CAROL STOVER, plaintiffs, individually and as representatives of a class, APPELLEES

versus

COMMUNITY SERVICES, INC., UPLANDS ASSOCIATES A, a Maryland Limited Partnership, UPLANDS ASSOCIATES B, a Maryland Limited Partnership, MORTON SARUBIN, Individually and doing business as Uplands Associates, APPELLEES

and

CARLA A. HILLS, Individually and in her capacity as Secretary of the Department of Housing and Urban Development, H. R. CRAWFORD, individually and in his capacity as Assistant Secretary for Housing Management of the Department of Housing and Community Development and EVERETT H. ROTHSCHILD, Individually and in his capacity as Acting Director of the Baltimore Area Office, Department of Housing and Urban Development, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JUDGMENT

THIS CAUSE came on to be heard on the record from the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. H-75-506

BARBARA ROSS ET AL., PLAINTIFFS, Individually and as representatives of a class

v.

COMMUNITY SERVICES, INC., ET AL., DEFENDANTS

May 16, 1975

MEMORANDUM OPINION

ALEXANDER HARVEY, II, District Judge:

Plaintiffs are low income tenants at the Uplands Apartments complex, which is located in Baltimore City and is a federally insured and assisted housing project under Section 236 of the National Housing Act. In this class action, plaintiffs seek to compel the Secretary of the Department of Housing and Urban Development (hereinafter "HUD") to implement and disburse operating subsidies under Section 212 of the Housing and Community Development Act of 1974) hereinafter the "1974 Housing Act"), 12 U.S.C. § 1715z-1. Plaintiffs also seek to enjoin the collection of a rent increase approved by HUD, effective May 1, 1975. Jurisdiction has been asserted pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-704; the National Housing Act, 12

U.S.C. § 1701 *et seq.*; and 28 U.S.C. §§ 1331, 1337 and 1361. Named as defendants are the owners and manager of the apartments (hereinafter "the private defendants") and various HUD officials, including the Secretary of HUD.

On August 22, 1974, Congress enacted the 1974 Housing Act. Section 212 of that Act amended Section 236(f) of the National Housing Act by authorizing the Secretary to make additional assistance payments (or operating subsidies) to Section 236 project owners in order to cover increased utility costs and property taxes exceeding the project's operating expense level. Section 236 of the National Housing Act affords rental housing opportunities to low income families by providing mortgage insurance and interest reduction payments to mortgagees on behalf of project owners of newly constructed and rehabilitated housing. The private defendants here are such project owners.

The initial operating expense level in the amended statute equals the sum of utility costs and property taxes payable by the project owner at the time the Secretary determines that the project is fully occupied. For projects receiving mortgage insurance and interest subsidies before August 22, 1974, an initial operating expense level must be established by the Secretary not later than 180 days after that date, or by February 14, 1975. The additional subsidy payments may be made to a Section 236 project owner only where there are tenants residing in the project who pay more than 30 per cent of their in-

come for rent. The maximum authorized operating subsidy is the amount necessary to reduce the rental charges of tenants paying more than 30 per cent of their income for rent down to 30 per cent of their income.

Section 212 also amended Section 236(g) of the National Housing Act by authorizing the Secretary to use excess rentals collected from project owners for the payment of these operating subsidies. Section 236(g) provides that the Secretary shall credit such excess rental charges to a reserve fund. Any balance in the reserve fund is to be used for the payment of the operating subsidies. The Secretary has decided, for reasons to be discussed more fully later, not to implement the provisions of Sections 236(f) and (g) in any way.

On March 28, 1975, HUD approved the private defendants' request for a rental increase. According to a letter from the Baltimore Area Director, the rent increase was attributable to "increased costs for utilities, real estate [taxes] and other justified operational costs." Shortly after the approval, plaintiffs were notified that their rents would be increased by 18 per cent effective May 1, 1975. Should plaintiffs and their class be required to pay this rent increase, they will have to use more than 30 per cent of their income to pay rental charges.

Plaintiffs assert that the increased cost of their rent is a cost which Congress mandated that the government must subsidize under Section 212 of the 1974 Act. They contend that the entire amount of these of 1974 hereinafter the "1974 Housing Act"). 12

costs are not costs properly payable by Section 236 project tenants through increased rentals. Plaintiffs seek a declaration that HUD's approval of the rent increase was unlawful and that HUD owes plaintiffs a duty under Section 212 to provide operating subsidies to the owners of the housing project. Plaintiffs have sought preliminary and permanent injunctive relief and a writ of mandamus compelling the HUD defendants to disburse an operating subsidy to the owners of the project.

Presently before the Court are plaintiffs' motion for a preliminary injunction and cross motions for summary judgment filed by the parties, as well as certain other motions. Suit was filed herein on April 22, 1975, and a Temporary Restraining Order was entered by Judge Young on April 28, 1975, prohibiting the private defendants from initiating ejectment proceedings to evict tenants who did not pay the challenged rent increases until further proceedings could be held in this case. The Temporary Restraining Order has now been extended until May 18, 1975, and because of the extreme urgency of this matter, rigid briefing schedules were set by the Court, briefs and affidavits and exhibits have been filed, and a full hearing has been held on the various motions that are pending.

The private defendants are placed directly in the middle by these proceedings. Plaintiffs and their class claim that HUD should pay all of the increased rentals, or that the increases should be rescinded. HUD claims that the tenants should pay the increase.

Meanwhile, no one is paying, and the private defendants have been judicially restrained from evicting the plaintiffs and from collecting the rent increase from the plaintiffs. Yet, as noted hereinafter, it is clearly established on this record that the project owners are entitled to the rent increases in full. They are behind in their mortgage payments, and their mortgage may be foreclosed because of their default. Inflation and drastic cost increases, which have been recognized by HUD, entitle the project owners to the rent increases which have now been put into effect but restrained by this Court. For these reasons, the Court agreed to have this immediate hearing and to rule at once on the pending motions.

Several preliminary matters can be dealt with summarily. I am satisfied that this Court has jurisdiction under 28 U.S.C. § 1361 and/or under 28 U.S.C. § 1337. *Brown* v. *Weinberger*, 382 F.Supp. 1092, 1095-97 (D.Md.1974); *Bloodworth* v. *Oxford Village Townhouses, Inc.*, 377 F.Supp. 709, 714-15 (N.D. Ga.1974).

I am further satisfied that the plaintiffs have standing to bring this action as the challenged action has or will cause them injury in fact, and they are within the zone of interests to be protected by the statute in question. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 90 S.Ct. 327, 25 L.Ed.2d 184 (1970). Plaintiffs are clearly the ultimate beneficiaries of the operating subsidies available under Section 212 of the 1974

Housing Act, as their rents are reduced if the subsidies are paid.

Next, I find (and plaintiffs and the private defendants have agreed) that this is a proper class action. The class consists of those tenants at Uplands whose incomes do not exceed 80 per cent of the median income for the Baltimore area and whose rents, under the increases approved as of May 1, 1975, exceeded 30 per cent of their adjusted gross incomes. It is the rents paid by these tenants which are eligible for an operating subsidy under Section 212 of the 1974 Housing Act. The private defendants have determined, and plaintiffs have agreed, that 424 of the 989 tenants at Uplands are members of the class of persons whom plaintiffs represent. I am satisfied, on the record here, that all the requirements of Rule 23, F.R.Civ.P., have been met, and therefore that this is a proper class action.

With respect to the merits, I find first that there is no merit to plaintiffs' contention that this Court should enjoin the collection of all of the rent increase, effective May 1, 1975. The affidavits and other undisputed facts show that the increased rentals were justified by the landlord's increased costs of operation. And the undisputed facts further show that the increased costs used as a basis for the landlord's application to HUD seeking approval of increases in rent were reasonable costs and were justified by present economic conditions. The application for the increases was properly submitted to HUD, and HUD's approval of the increase was entirely justified.

Plaintiffs further argue that the rent increases should be rescinded because HUD was required by law to consider whether or not to pay operating subsidies under Subsections (f)(3) and (g) of Section 236 before approving any such increases. There is no statutory support for such a contention. Nowhere does it appear in the Act that approval of a rent increase must await a determination whether the project qualifies for an operating subsidy. Under Subsections (f)(3) and (g), HUD should act within a reasonable time after a request for a subsidy is made, but not necessarily before an increase is approved.

We thus come to the real essence of the controversy here. The central issue presented is solely one of statutory construction. The statutory provisions in question are as follows:

Section 236(f)(3):

> For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rent-

als of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

Section 236(g):

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsec-

> tion and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

The facts here are not in dispute. The question is: what duty does HUD have under these statutory provisions to pay operating subsidies to the Uplands project owners, under the undisputed facts? Some background discussion is necessary at this point.

The Housing Act of 1949, 42 U.S.C. § 1441 *et seq.*, which is the foundation for subsequent housing legislation, mandated "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family," and provided that HUD "shall exercise [its] powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established."

Despite this legislation and subsequent efforts at implementing new housing programs, national housing objectives were not attained. In 1968, Congress responded by enacting the Housing and Urban Development Act, which, among other things, added Section 236 to the National Housing Act. Section 2 of the 1968 Housing Act reaffirmed the national goal of the 1949 Housing Act and noted that "this goal has not been fully realized for many of the Nation's lower

income families." In Section 2, Congress declared that "the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality."

The 1974 Housing Act was designed to deal with problems which had occurred in the administration of federal housing programs since the 1968 Housing Act. Section 212, and in particular the subsections at issue here, subsections (f)(3) and (g), were intended to give the Secretary authority to adjust the subsidies for Section 236 project owners in order to meet increased operating costs. Under the 1968 Housing Act, the Secretary lacked authority to make such adjustments, with the result that increased operating costs were passed along from time to time *in toto* to tenants as increased rental charges.

The concern of the Congress about the effect of increased costs and resulting increased rents in Section 236 projects and its intent in enacting Section 212 of the 1974 Housing Act are expressed in the Senate Report which accompanies the Senate version of the Act, which was the one finally enacted. The Report in part is as follows:

> The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments.

While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance, and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A) the amount by which the sum of the cost of utilities, maintenance and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community.

Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the "excess" funds derived from project operations were made available for the making of the additional assist-

> ance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expense ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the "initial" ratios as of a date not later than 180 days after enactment of the bill.

S.Rep. No. 93-693, 93rd Cong., 2nd Sess. (1974), *reported in* 3 U.S. Code, Cong. & Admin.News, pp. 4273, 4303-04 (1974).

It should be noted that the word "maintenance" was ultimately removed from the legislation which thus now relates only to the excess "cost of utilities and local property taxes." Quite clearly, the Congressional intent was not to cover all of any increase in rents, but only some of the increase. Indeed, the word "offset" is used in this Senate Report.

The very situation envisioned by Congress has occurred here. Increased operating costs at Uplands have resulted in increased rents, which the record shows are entirely justified. Yet the low income tenants affected are unable to pay all or a part of such increased rents and may now face eviction. It was precisely this problem which led Congress to pass the 1974 amendments and to direct the Secretary of HUD to set aside excess rentals collected to pay operating subsidies where the conditions of the

statute were met. Such subsidies inure, of course, to the benefit of the low income tenants.

But in the face of this Congressional intent, what has been HUD's approach? Simply put, HUD has adopted the position that it will not implement the program in any way. Claiming that it has been given broad discretion by Congress to make these payments, HUD has decided that it will exercise such discretion to make no payments at all to any projects at any time, whether worthy or not and whether the project might fully qualify under the Congressional standards or not.

The reasons for HUD's approach are quite frankly stated in the Secretary's Brief and are further stated in argument. HUD purely and simply disagrees with the Congressional policy. As stated in its Brief, at pages 31 and 32:

> HUD has determined that it is essential to formulate a broad policy which will address itself to the economic problems facing all multifamily projects assisted by HUD. * * *
>
> "The operating subsidy authorized by Section 236, however, is not addressed to the problems facing all multifamily projects assisted by HUD under the National Housing Act. These operating subsidies would benefit only Section 236 projects and, even then, would not be applicable to every Section 236 project. These operating subsidies thus will not have a significant effect upon the economic difficulties facing all multifamily projects assisted by HUD.

Of course, these subsidies benefit only Section 236 projects. Congress has flatly so provided. And of course the subsidies would not be applicable to every Section 236 project. Again, this was the clear Congressional intent spelled out in the legislation. Continuing from HUD's Brief:

> Accordingly, the Secretary has exercised the discretion vested in her and has determined that implementation of these operating subsidies will not attack the general problems facing all multifamily projects. * * * Instead, HUD is considering a number of alternative proposals which would yield solutions which are more comprehensive and more equitable.
>
> * * * * *
>
> While HUD is examining the potential effectiveness of the alternative approaches, it does not plan to implement the operating subsidies authorized by Section 236.

The position taken by HUD here is arbitrary and capricious and an abuse of discretion. As the Fourth Circuit said in *Campaign Clean Water, Inc.* v. *Train*, 489 F.2d 492, 498 (4th Cir. 1973), *vacated on other grounds*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1975):

> When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive tres-

passes beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review.

It is not HUD's prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch. *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 695 (1971).

I find on the record here that the federal defendants acted contrary to the requirements of Section 236(f)(3) and (g) when they refused to even consider whether under the circumstances of this case the private defendants were entitled or not to receive operating subsidies and whether the plaintiffs were entitled to the benefit of such subsidies. I will therefore order the federal defendants to comply with the law.

Plaintiffs have argued that the operating subsidies should equal the entire amount of the increase in their rent. Clearly, there is no support in the statute for this position. The increase is confined solely to increases in the costs of utilities and in local property taxes. It is estimated that this figure is approximately 50 per cent of the entire increase. Thus, the tenants themselves will have to pay the other portion of the rent increase. Congress undertook to alleviate

the burden placed on tenants, but did not go all the way and provide that the operating subsidy should account for all of any increase such as this one.

Fashioning the appropriate relief presents some difficulty in this case. Parts of the statute place mandatory duties on HUD, but other parts quite clearly require HUD to exercise its discretion. The statute requires HUD first to establish an initial operating expense level for each project. This was required to be done before February 18, 1975, and the language used was "shall". Although the duty is mandatory, HUD has arbitrarily refused to comply with this portion of the statute. No determinations at all have been made in this or any other case. Under this Court's powers of mandamus, the defendants will be ordered to make this determination for this project. I might note that the undisputed facts show that the project was, as of August 1973, fully occupied, but HUD should make the determination under the law.

Other duties imposed on the Secretary by the statute are indeed discretionary. But this does not mean that the Secretary may flatly refuse to exercise her discretion at all. She must, under the statute, consider whether this project qualifies for an operating subsidy under the enactment. This includes determining whether the increase in the cost of utilities and local property taxes is reasonable and comparable to cost increases affecting other rental projects in the community. Presumably, this increased cost is reasonable and comparable. HUD has already approved

a rent increase for this project based in part on these increased costs, and it would be surprising if HUD suddenly now found such increases to be unreasonable or not comparable to others in the community, or if it suddenly found that this project has not been tightly administered or has been poorly managed. Of course, management has little control over utility cost increases and increased taxes, and it is difficult to understand how such increases might be attributable to poor management. If this project and these increases satisfy these requirements and if there is no other valid reason why this project should not receive the operating subsidy, HUD should pay it, provided that HUD finds that the balance in the reserve funds is sufficient. The record here shows $31 million presently in the reserve fund. It simply is not a valid reason for HUD to say that it does not approve of the Congressional policy and does not intend to pay these subsidies to anyone, or that it would like to allocate this amount for payment elsewhere. In exercising its discretion, HUD should set forth reasons for the conclusion it reaches. The Court and the parties will then be able to determine whether such discretion has been properly exercised.

One further point should be considered. The federal defendants argue that the Secretary has no available contract authority to make these payments and that Congress must first release contract authority, specifically approving payments for each operating subsidy. This Court would disagree. Congress allowed the Secretary to release her own contract au-

thority for operating subsidies of this sort by allowing the Secretary to add the special reserve fund here to appropriations previously authorized.

I do not find that it was the intent of Congress in enacting Section 212 of the 1974 Housing Act to require that the Secretary would have to come back to Congress for contract authority each time it wished to expend these reserve funds. Congress directed in Subsection (g) that the excess reserve fund "shall be available" for the purpose of making these payments. This Court has previously found that the Congressional intention was that the funds set aside in this special reserve should be expended, if the Secretary makes the findings required in Subsection (f)(3). Certainly, it would make little sense (and indeed would render the program inoperative as a practical matter) if as to each project the Secretary would have to come back to Congress to secure contract authority to expend the necessary sums. The Secretary's argument as to a lack of contract authority here is no more than another aspect of the argument previously rejected that she has complete discretion to refuse to implement Congressional policy. This was a special reserve fund, created by excess rental charges, and not included in any Congressional appropriation. Thus, it is not subject to restrictions applicable to other appropriations under Section 236. Furthermore, I do not find that the Secretary had discretion to allocate this reserve fund for some purpose other than the payment of operating subsidies as provided in Subsections (f)(3) and (g).

What this Court will do is grant the preliminary injunction as to the federal defendants and retain jurisdiction of the case until the necessary determinations have been made by HUD. If the operating subsidies are approved, then that will end the case. If disapproved, plaintiffs will be entitled to consider the reasons for such disapproval and then apply to the Court for further relief if plaintiffs conclude that the Secretary has abused her discretion. Meanwhile, the Secretary will be ordered to pay the operating subsidy to the private defendants, commencing as of May 1, 1975. And the plaintiffs should pay, as of May 1, 1975, the portion of the increase not covered by increased utility or property tax costs.

The requirements for the entry of a preliminary injunction were set forth by the Fourth Circuit in *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F.2d 232, 235 (4th Cir. 1971), as follows:

> [I]t is sufficient if the court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant. * * *

Other Fourth Circuit cases have indicated the the inquiry must also determine whether plaintiff will suffer irreparable injury if the injunction does not issue. *Long* v. *Robinson*, 432 F.2d 977 (4th Cir. 1970).

All of these requirements have been met here. I find that the plaintiffs will probably succeed in this case to the extent covered by the statute because the facts in the record indicate that this project probably will satisfy the requirements for a subsidy. If these payments are not ordered to be made at this time, plaintiffs may suffer irreparable harm. In balancing the equities, I would note that the effect of not entering a preliminary injunction would be considerable as far as the plaintiffs are concerned and as far as the private defendants are concerned, but that HUD would suffer very little if required to pay this operating subsidy from the $31 million available, during the pendency of this litigation. There are excess rentals now in existence in HUD's hands from which these payments can be made, and Congress has mandated that payments should be made if HUD determines that the statutory prerequisites have been met.

Finally, some of the cases say that the Court should consider the public interest in deciding whether or not to grant a preliminary injunction. There are two aspects of such a consideration here. First, it is of the utmost interest to the public that administrative bodies obey the law. Secondly, it is in the public interest that these low income tenants receive the help that Congress has directed they should receive, if, as it appears, they qualify for it.

I would suggest that counsel meet and prepare an Order which will grant the preliminary injunction. The Order should designate the class, it should include a brief statement as to a declaratory decree or

finding of the Court, and it should require the plaintiffs to pay the part of the rent that they have to pay. The Order should require the federal defendants to pay the subsidy as required by law and should direct the federal defendants to make determinations as promptly as possible under the statute. Finally, the Order should also provide that the Court would retain jurisdiction for any further proceedings necessary.

APPENDIX D

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. H-75-506

BARBARA ROSS ET AL., PLAINTIFFS, Individually and as representatives of a class

v.

COMMUNITY SERVICES, INC., ET AL., DEFENDANT

Dec. 31, 1975

ALEXANDER HARVEY, II, District Judge:

In *Ross* v. *Community Services, Inc.*, 396 F.Supp. 278 (D.Md.1975), this Court ruled that plaintiffs, who are tenants at a federally-assisted housing project, were entitled to a preliminary injunction during the pendency of this case. Reference is made to that Opinion for a full discussion of the background of this litigation and of the questions presented. In its Order entered herein on May 19, 1975, this Court (1) certified a class of tenants to be represented by plaintiffs, (2) directed the federal defendants to make certain determinations required by Section 236 of the National Housing Act, and (3) required that the plaintiffs-tenants and defendant HUD should meanwhile each pay defendant Uplands, the landlord, one-

half of the rent increase which had become effective May 1, 1975.[1]

In compliance with that Order, the determinations in question have been made by the federal defendants, and affidavits reflecting such determinations have been filed herein. Presently before the Court are cross motions for summary judgment, together with supporting memoranda, filed by the plaintiffs and by the federal defendants.[2] Having agreed that the case is properly at issue for final determination, the parties have further agreed to the entry of an Interim Order[3] adjusting the payments to be made by the federal defendant to Uplands as an operating subsidy in accordance with the determinations made by HUD.

In its Opinion in the *Ross* case, this Court considered the Uplands rent increase of May 1, 1975 in the light of Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1, which was enacted on August 22, 1974 and which amended Section 236 of the National Housing Act. Plaintiffs' contention that they should not be required

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[1] The federal defendants filed a notice of appeal and a motion to stay the effect of that Order pending appeal. When the motion for a stay pending appeal was denied by this Court, the federal defendants dismissed their appeal pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure.

[2] The defendant Uplands has taken no position concerning the merits of the case.

[3] Such Order was filed on September 24, 1975.

to pay any part of such rent increase was rejected, this Court having found that the increased rentals in question were justified by the landlord's increased costs of operation and that the application for the increases had properly been approved by HUD.[4] 396 F.Supp. at 282-83. This Court then discussed in detail the applicability to this case of amendments to Section 236(f) and (g) of the National Housing Act, which authorized the Secretary of the Department of Housing and Urban Development to make certain assistance payments or operating subsidies to Section 236 project owners in order to cover a part of rent increases resulting from increased utility costs and property taxes exceeding a project's operating expense level.

In opposing plaintiffs' motion for a preliminary injunction, the federal defendants took the position that HUD had the discretion, under Subsections (f)(3) and (g) of Section 236, to refuse to make any operating subsidy payments to any project owner, including the defendant Uplands. This Court disagreed. 396 F.Supp. at 285-87. In entering a preliminary injunction, this Court ordered the Secretary to establish an initial operating expense level for the Uplands project and then to determine whether this project qualified for an operating subsidy under the statute. If the project and the rent increases in question were found to satisfy the requirements of the

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[4] In now moving for summary judgment, plaintiffs have not challenged that ruling.

law and if there were no other valid reason why this project should not receive the operating subsidy, this Court indicated that HUD should pay it, provided that the balance in the reserve fund set aside for such payments was sufficient to make the payment in question. 396 F.Supp. at 287.

As required by this Court, various determinations have now been made by HUD officials and have been made a part of the record in this case. Affidavits have been filed establishing an initial operating expense level for the Uplands apartment complex, as required by Section 236(f)(3).[5] Neither the plaintiffs nor the private defendants have questioned the correctness of the calculations that have now been made by HUD. The amount of the monthly operating subsidy payable to the private defendants under Section 236 has thus been agreed upon by all parties and has in fact been incorporated in the Interim Order which is to control payments to Uplands until a final decision has been made concerning the merits of this case.[6]

In moving for summary judgment, the federal defendants make essentially the same contentions previously rejected by this Court in the *Ross* opinion.[7]

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[5] The affidavits were submitted by Fred W. Pfaender, Director of HUD's Office of Loan Management.

[6] The Interim Order of September 24, 1975 did modify HUD's proposals slightly so as to permit a more equitable distribution of the operating subsidy among the tenants.

[7] The federal defendants have not challenged this Court's rulings that jurisdiction exists under 28 U.S.C. § 1361 and/

These defendants do not claim that any reason exists why the Uplands apartment complex would not qualify for assistance payments under Subsections (f)(3) and (g) of Section 236. Indeed, HUD has previously approved the rent increase of May 1, 1975. The undisputed facts show that increases in the cost of utilities and real property taxes which have caused most of the increase in the rents now charged by Uplands to the plaintiffs are reasonable. No contention has been made by HUD that the increased costs are not comparable to increases affecting other rental projects in the community. In spite of these facts indicating that the Uplands project is eligible for the subsidy payments in question, the federal defendants have taken the position, as they did earlier, that Congress, in amending Section 236 in 1974, gave HUD absolute discretion to decline to make any subsidy payments to any project, whether it would qualify for such payments or not. For the reasons previously stated in *Ross* v. *Community Services, Inc.*, *supra*, this Court concludes that there is no merit in the position taken by the federal defendants. Accordingly, plaintiffs' motion for summary judgment will be granted and the federal defendants' motion for summary judgment will be denied.

In *Ross*, this Court first discussed national housing policy as reflected in the Housing Act of 1949 and the Housing and Urban Development Act of

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or under 28 U.S.C. § 1337 and that plaintiffs have standing to bring this action. *See* 396 F.Supp. at 282.

1968 and then examined the legislative history which led to the enactment of Section 212 of the 1974 Housing Act. The conclusion was reached that Congress never intended to give HUD the discretion to decide as a matter of policy that no subsidy payments would be made to any project, whether it qualified under the statute or not. When the conclusions and findings in *Ross* are reviewed in the light of federal defendants' pending motion for summary judgment and supporting brief, this Court concludes that its earlier determinations are sound and require that plaintiffs be granted final relief in this case.

The federal defendants' reading of the statute miscomprehends the discretion conferred on HUD by Congress in amending Section 236(f) and (g). These defendants argue that Congress vested absolute discretion in the Secretary with respect to operating subsidies. Undoubtedly, the Secretary under Section 236(f)(3) has the discretion to determine whether a particular increase in the cost of utilities or real estate taxes is reasonable and is comparable to cost increases affecting other rental projects in the community. But Congress hardly intended to give the Secretary blanket discretion to frustrate Congressional policy and in effect adopt a different policy which the Secretary might believe would result in more comprehensive and more equitable results. Congress would hardly have included in this legislation provisions requiring the Secretary to establish an initial operating expense level for a project and requiring the Secretary to thereafter determine whether

such project qualified for the subsidy if, after those determinations had been made, the Secretary was empowered to decide that it would not in any event make the payments to a qualified recipient.

As this Court said in *Ross, supra* at page 286:

> It is not HUD's prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch. *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 695 (1971).

On the record here, this Court finds that HUD has abused the discretion conferred upon it under Section 236(f)(3) and (g) in declining to make the subsidy payments requested to Uplands on behalf of the plaintiffs. The facts show that this project qualifies for the payments in question and that the balance in the reserve funds is sufficient for the payments in question. No reason has been advanced by HUD in support of its decision other than its disagreement with the policy behind the legislation.

It is further argued that this Court's construction of Section 236 does not give proper deference or weight to the administrative interpretation which HUD has given the statute. *See Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 192, 13 L.Ed.2d 616 (1965).

The federal defendants also contend that Congress has approved HUD's interpretation of Section 236 by failing to take corrective action after having been informed of the Secretary's intent not to implement the opertaing subsidy program.

But the statute in question is a very recent enactment. Congress passed the 1974 Housing Act on August 22, 1974, and this suit was filed some eight months later. Such an interval is hardly sufficient to show a long-standing administrative interpretation which might tend to establish the validity of a particular construction. In any event, a court should accord no weight to an agency interpretation that is not "consistent with the congressional purpose," *Morton* v. *Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), or where there are " 'compelling indications that it is wrong.' " *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973). As discussed more fully in the *Ross* opinion, the clearly expressed Congressional purpose was to establish a program designed to provide assistance to low income tenants who were required to pay increased rents justifiably resulting from a landlord's increased costs. HUD was empowered to administer the program but was not authorized to refuse to implement the program in any way. There are compelling indications in this case that HUD's interpretation of the statute is wrong.

Nor would the failure of Congress to act in the brief period since these amendments became law sug-

gest that Congress has concurred in the administrative interpretation which HUD has accorded this statute. As the Court observed in *Pennsylvania* v. *Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 861 (1974), Congress "cannot be put to the necessity of acting twice before it is taken to mean what it said in duly enacted legislation."

The federal defendants have also renewed the argument rejected in *Ross* that the Secretary has no available contract authority to make the subsidy payments in question. *See* 396 F.Supp. at 287. The affidavit relied upon, that of Mr. Alfred J. Kliman, Director of HUD's Office of Budget, does not support such contention. As amended by the 1974 Housing Act, Section 236(g) specifically establishes "a reserve fund to be used by the Secretary to make additional assistance payments" under the operating subsidy program. Such fund "shall be available" for the purpose of making the payments in question. By the terms of this statute, Congress has provided the Secretary with the necessary contract authority for payment of operating subsidies. The reserve fund has been made unconditionally available for the payments in question. HUD seeks to avoid this result by arguing that the availability of the reserve fund established by Section 236(g) is restricted by the requirements of Section 236(i). Before 1974, use of the reserve fund was expressly made "subject to limits approved in appropriation Acts pursuant to subsection (i) of this section." *See* Section 236(g), 12 U.S.C.A. § 1715z-1(g) (1969 Ed.) But Section

212(3) of the 1974 Housing Act removed this restriction with respect to operating subsidies and made these sums immediately available for payment. The reserve fund, which is an accumulation of "all rental charges collected in excess of the basic rental charges" for a Section 236 project, presently shows a balance of approximately $31 million. This amount is presently on hand and available to the Secretary for the payment of operating subsidies, and no further release of contract authority by Congress is necessary for disbursement of portions of this fund to plaintiffs.

Finally, the federal defendants argue that the inadequacy of the present reserve fund supports the Secretary's decision not to implement the operating subsidy program. It is claimed that the $31 million reserve fund is not sufficient for the program because $51.4 million would be needed to cover the estimated costs of operating subsidies for all Section 236 projects which might qualify. The simple answer to this contention is that there is no indication that all Section 236 projects would qualify for an operating subsidy or have even applied for one. This Court has before it only the claims of the tenants at this one project. Speculation as to what might occur if other applications are filed at some time in the future would hardly furnish grounds for defeating the present rights of these plaintiffs. If, after implementation of the operating subsidy program, the approval of future applications would deplete the amount of the reserve fund, then, as the Supreme Court ob-

served in *Morton* v. *Ruiz*, *supra* 415 U.S. at 230, 94 S.Ct. at 1072 (1974), the Secretary may "create reasonable classifications and eligibility requirements in order to allocate the limited funds available to [her] for this purpose." However, the mere possibility that the reserve fund may prove insufficient at some time in the future is not justification for the Secretary's refusal to make any payments at all to Uplands at this time.

For the reasons stated, plaintiffs' motion for summary judgment is granted, and the federal defendants' motion for summary judgment is denied. Plaintiffs and their class are entitled to a permanent injunction requiring the federal defendants to make monthly subsidy payments to the defendant Uplands in the amounts previously agreed upon. Counsel are directed to confer and submit an appropriate Final Order.

APPENDIX E

STATUTORY PROVISIONS

12 U.S.C. 1715z-1 provides in pertinent part:

(a) *Authorization for periodic interest reduction payments on behalf of owner of rental housing projects.*

For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

(b) *Restrictions on payments; payments with respect to projects financed under State or local programs; mortgage insurance premium.*

Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided*, That the Secretary is authorized to continue making such assistance payments where the mortgage has been assigned to the Secretary: *Provided, further*, That interest reduction payments may be made with respect to a mortgage or part thereof on a rental or cooperative housing project owned by a private nonprofit corporation or other pri-

vate nonprofit entity, a limited dividend corporation or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which may involve either new or existing construction and which is approved for receiving the benefits of this section. The term "mortgage insurance premium", when used in this section in relation to a project financed by a loan under a State or local program, means such fees and charges, approved by the Secretary, as are payable by the mortgagor to the State or local agency mortgagee to meet reserve requirements and administrative expenses of such agency.

(c) *Amount of payments.*

The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

12 U.S.C. 1715z-1(f)(3) provides:

(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at

the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

12 U.S.C. 1715z-1(g) provides:

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph

(3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

42 U.S.C. 1441 provides:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. . . .

42 U.S.C. 1441a provides:

The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

P.L. 94-378 provides in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * *

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for

payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000; *Provided*, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

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